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February 25, 2011

Corbin Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, Michigan 48090

Re: ADM File No. 2006-38
Proposed Amendment of Rule 8.110

Dear Mr. Davis:

I write to oppose a portion of the proposed amendment to Rule 8.110(C)(8), requiring a chief judge's notification to the Attorney Grievance Commission ("AGC") upon "finding that a lawyer has provided incompetent representation." Our primary concern is that "incompetent" representation is not defined in the proposal, and will be misunderstood as requiring a report to the AGC of "ineffective" representation.

The State Appellate Defender Office regularly finds itself researching and investigating claims that trial counsel provided ineffective assistance during some stage of the lower court proceedings. The United States Supreme Court has provided a framework for appellate review of such claims consistent with the constitutional right to the effective assistance of counsel as stated in *Strickland v Washington*, 466 US 668 (1984) which is also used in Michigan courts, as described in *People v Pickens*, 446 Mich 298 (1994). Essentially, in order to find that counsel was ineffective, the appellant must establish both deficient performance and prejudice.

It should go without saying that deficient performance can be based upon a variety of factors, some of which may involve gross negligence or unethical conduct. More often than not, though, mistakes are made due to excessive caseloads, lack of knowledge of a particular area of law, miscommunication with clients or witnesses, or even a simple failure to object during trial. While mistakes of this kind can constitute "deficient performance" and prejudice the entire case, our fear is that the proposed reporting requirement will conflate such ordinary mistakes of counsel to unethical behavior. Surely the AGC has no interest in reports of ordinary findings of ineffective assistance of counsel, as such findings do nothing to promote the integrity of the bar. To the contrary, when trial attorneys *are* willing to admit their mistakes they are acting ethically in connection with their duty of candor toward the tribunal. MRPC 3.3. If ordinary mistakes are reportable to the AGC, it will frustrate appellate investigation and have a chilling effect on the requirement of candor.

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We have no objection to the AGC's interest in reports of lawyers being held in contempt, or engaging in misconduct that reflects adversely upon the lawyer's fitness to engage in the practice of law. But we suggest that the proposed language "or finding that a lawyer has provided incompetent representation" be deleted as it is confusing, inappropriate and unnecessary.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Dawn Van Hoek". The signature is written in dark ink and is positioned above the typed name.

Dawn Van Hoek
Acting Director
State Appellate Defender Office